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ABSTRACT

The motion of the American Council of Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) to reverse the Fifth Circuit Court of Appeals decision in The University of Texas vs. Walter Camenisch is presented. The decision had ordered the university to provide free interpreter services to Camenisch, a deaf student. The ACE and NIICU argument revolves around whether, under Section 504 and the Court's ruling in Southeastern Community College v. Davis, colleges and universities that receive federal aid are required to procure and compensate interpreters for hearing-impaired graduate students. The argument presented includes the following suggestions: (1) the Fifth Circuit's interpretation of the Departmental regulation (504) is not supported by the language of the provision at hand; (2) the Court of Appeals' holding conflicts with the Supreme Court's decision in "Davis" because it operates to establish an affirmative action obligation not authorized by the state; and (3) the Fifth Circuit's decision fails to accord proper consideration to the reasonableness of the accommodation requested and the hardship it would impose on the University of Texas' program. It is proposed by ACE and NIICU that the Court affirm its decision in Southeastern Community College v. Davis and hold that the nondiscrimination requirement of Section 504 does not obligate a covered university to procure and compensate a sign language interpreter for a deaf graduate student where that student is able to pay the costs. (LC)

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ED203834

IN THE

Supreme Court of the United States

October Term, 1980

No 80-317

UNIVERSITY OF TEXAS, *et al.*,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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Respondent.

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MOTION OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES FOR LEAVE TO FILE BRIEF AMICI CURIAE

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the American Council on Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) move this Court for leave to file the accompanying brief as *Amici Curiae* supporting the petitioners, The

University of Texas *et al.* In support of this motion, ACE and NIICU show as follows:

1) The American Council on Education (ACE) and the National Institute of Independent College and Universities (NIICU) are nonprofit corporations organized under the laws of, and located in, the District of Columbia.

2) Founded in 1918, the ACE is a voluntary membership organization composed of 1,401 nonprofit institutions of higher education from both the public and private sectors and 178 educational associations and organizations. NIICU's membership consists of approximately 800 independent, non-public colleges, universities and educational associations.

3) The ACE is the nation's major coordinating body in postsecondary education. NIICU's mission is to provide a unified national voice for independent higher education in the shaping of public policy. As organizations whose members include the overwhelming majority of four-year colleges and universities, ACE and NIICU are uniquely able to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

4) Most of ACE's and NIICU's members operate federally assisted education programs subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

5) Accordingly, ACE's and NIICU's members have a direct interest in the primary substantive issue presented for the Court's consideration in this case: whether under Section 504 and this Court's ruling in *Southeastern Community College v. Davis,* colleges and universities that receive federal aid are required to procure and compensate interpreters for hearing impaired graduate students.

6) Because of their interest in issues involving the proper interpretation of Section 504 and the implementing administrative regulations ACE and NIICU both filed briefs as Amicus Curiae in this Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). On other occasions, ACE and NIICU have been granted permission by this Court to file briefs as *amicus curiae. See, e.g., Forsham v. Califano*, 445 U.S. 169 (1980); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); and *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 34 (1978).

7) The written consent of counsel for the petitioners to the filing of this brief has been filed with the Clerk of the Court. Counsel for the respondent indicated that he would not consent, thereby necessitating this motion.

Wherefore, it is respectfully moved that the ACE and NIICU be granted leave to file the accompanying brief *amici curiae* in this case.

Respectfully submitted,

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BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The American Council on Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) are nonprofit corporations organized under the laws of, and located in, the District of Columbia. Founded in 1918, the ACE is a voluntary membership organization composed of 1,401 nonprofit institutions of higher education from both the public and private sectors and 178 educational associations and organizations. NIICU's membership consists of approximately 800 independent, non-public colleges, universities and educational associations.

The ACE is the nation's major coordinating body in postsecondary education. NIICU's mission is to provide a unified national voice for independent higher education in the shaping of public policy. As organizations whose members include the overwhelming majority of four-year colleges and universities, ACE and NIICU are uniquely able to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

Most of ACE's and NIICU's members operate federally assisted education programs subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Accordingly, ACE's and NIICU's members have a direct interest in the primary substantive issue presented for the Court's consideration in this case: whether under Section 504 and this Court's ruling in *Southeastern Community College v. Davis,* colleges and universities that receive federal aid are required to procure and compensate interpreters for hearing impaired graduate students.

STATEMENT OF THE CASE

Prior to enrolling in graduate courses at The University of Texas at Austin in 1977-78, Respondent, an individual with a severe hearing impairment, asked both The University and the Texas State Rehabilitation Commission for funds to pay sign language interpreters to assist him in all his classes. The Rehabilitation Commission refused his request because it said Respondent did not have a "substantial employment handicap." The University denied him funds because it said Respondent did not have need for financial assistance as determined under The University's standard formula for awarding student financial aid.

As a result of these denials of assistance, Respondent filed a complaint and motion for preliminary relief against The University and several of its officers asking, under Section 504 of the Rehabilitation Act of 1973 and the Fourteenth Amendment to the United States Constitution, that The University be ordered to provide free interpreter services to Respondent. The trial court determined, without reaching the merits of Respondent's claim and without explanation, that there was a substantial likelihood Respondent ultimately would prevail on the merits under §504. Accordingly, without reaching Respondent's constitutional claim, it entered an order requiring The University to procure and compensate an interpreter for Respondent.

The University of Texas appealed entry of this preliminary order to the Fifth Circuit Court of Appeals. The Court of Appeals narrowly reviewed the district court's order to determine whether the court abused its discretion in entering the preliminary injunction, and it sustained the lower court's action.

In reviewing the merits of Respondent's claim to determine his likelihood of ultimate success, the Fifth Circuit examined the regulations of the Department of Health, Education and Welfare (HEW) and the Supreme Court's decision in *Southeastern Community College v. Davis.* The Court of Appeals found that the HEW regulations imposed "strict liability" on The University to provide Respondent with free interpreter services, and it determined, under *Davis,* that the regulatory requirement did not constitute an affirmative action obligation unauthorized by Section 504.

SUMMARY OF ARGUMENT

The Supreme Court held in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), that Section 504 of the Rehabilitation Act of 1973 only prohibits discrimination against qualified handicapped persons and does not require recipients of federal aid to assist handicapped persons in overcoming their disabilities. Nonetheless, the Fifth Circuit Court of Appeals decided in this case, *Camenisch v. The University of Texas, et al.*, 616 F.2d 127 (1980), that Section 84.44(d)(1) of the Department of Health Education and Welfare's 504 Regulation, 45 C.F.R. Part 84 (1979), imposed an absolute requirement on The University of Texas to procure and compensate a sign language interpreter for a deaf graduate student.

The Fifth Circuit's interpretation of the Departmental regulation is not supported by the language of the provision at issue. Moreover, the Court of Appeal's holding conflicts with the Supreme Court's decision in *Davis* because it operates to establish an affirmative action obligation not authorized by the statute. Finally, the Fifth Circuit's decision fails to accord proper consideration to the reasonableness of the accomodation requested and the nature of the hardship such an accomodation would impose on the operation of The University of Texas' program—both of which considerations are necessary to a determination whether The University engaged in handicap discrimination prohibited by Section 504.

ARGUMENT

I.

THE NONDISCRIMINATION REQUIREMENT OF SECTION 504 DOES NOT IMPOSE ON THE UNIVERSITY OF TEXAS AN OBLIGATION TO PAY THE COSTS OF SIGN LANGUAGE INTERPRETERS FOR A DEAF GRADUATE STUDENT PARTICULARLY WHERE THE STUDENT HAS NOT MADE A SHOWING OF FINANCIAL NEED.

A.

Section 84.44(d)(1) of the §504 Regulation does not require the University of Texas to provide at no cost the services of sign language interpreters.

The Fifth Circuit Court of Appeals held without explanation that the following regulation of the Department of Health, Education and Welfare (HEW) required The University of Texas to provide Walter Camenisch, a deaf graduate student, with a free sign language interpreter in each of his classes:

> A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills. 45 C.F.R. §84.44(d)(1)(1979).[1]

[1] *Camenisch v. The University of Texas*, 616 F.2d 127 (1980).

The court's interpretation of the regulation is not required by the language quoted above, and it conflicts with the Supreme Court's holding in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

On its face, §504 prohibits only discrimination based "solely" on a person's handicap.[2] Section 84.44(d)(1) of the implementing regulation explicitly requires only that a college or university that is a federal aid recipient take "such steps as are *necessary to ensure* a handicapped student is not denied the opportunity to participate in its programs "because of the absence of educational auxiliary aids."

In the instant case, the record shows Mr. Camenisch was not discriminatorily denied the opportunity to attend The University of Texas because interpreter services were unavailable. In fact, the record demonstrates that The University of Texas took all the necessary steps required by the regulation to ensure Walter Camenisch would have the interpreter services he said he needed.

In the summer of 1977, Walter Camenisch asked both The University of Texas at Austin and the Texas Rehabilitation Commission to provide funds to meet the costs of sign language interpreters for classes in which he intended to enroll the following winter and spring semesters. Paragraphs 11 and 12 of Plaintiff's Verified Complaint (Civ. Action No. 78-061 filed March 1, 1978). In October 1977, the Texas Rehabilitation Commission informed Mr. Camenisch it would not provide him with such funds because he did not have "a substantial employment handicap." Paragraph 12 and Exhibit 3 of Plaintiff's

[2] 29 *U.S.C.* §794 (1976).

Verified Complaint (Civ. Action No. 78-061 filed March 1, 1978). The University of Texas at Austin referred Mr. Camenisch to its Office of Student Financial Aid to discuss his need for financial assistance. In October 1977, The University informed Mr. Camenisch it would not provide the funds he requested for interpreter services because he had failed to meet the University's standard criteria for provision of financial aid. Paragraph 11 and Exhibit 22 of Plaintiff's Verified Complaint (Civ. Action No. 78-061 filed March 1, 1978).

These facts demonstrate that, contrary to the Fifth Circuit's finding, Mr. Camenisch was not discriminated against within the meaning of §504 or denied services required by the implementing regulations. To the extent Mr. Camenisch did not have the interpreter services he needed, it was because he refused to pay for them, or because the state vocational rehabilitation agency refused to pay for them, not because The University of Texas failed to meet its obligation not to discriminate against him *"solely"* by reason of his handicap.[3]

Amici are sensitive to the fact that since Section 504 was passed many state rehabilitation agencies, like the one in the instant case, have narrowly interpreted their responsibilities to provide services authorized by other provisions of the Rehabilitation Act of 1973 and have denied many students in higher education rehabilitation services they need. Clearly, this was not the result intended by HEW when it published the 504 Regulation.

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[3]The Supreme Court has held previously that where wealth is involved the Constitution does not require "absolute equality or precisely equal advantage" even with respect to compulsory elementary education. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). This suggests it is not inappropriate in this case to treat Respondent differently because of his financial circumstances.

In analyzing the requirements of Section 85.44(d) of the Regulation, the Department stated explicitly its understanding that:

> recipients can usually meet this obligation [to take the steps necessary to ensure the availability of auxiliary aids] by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges and universities." Analysis of Final Regulation, Appendix A, 42 *Fed. Reg.* 22676, 22692-3 (1977).

This expectation was underscored in the required[4] inflationary impact statement published with the proposed §504 rule and later updated.[5]

In the impact statement, the cost of providing services (including auxiliary aids) under the "Higher Education" part of the Regulation, Subpart E, was not estimated because it was assumed to be "negligible." 41 *Fed. Reg.* 20312, 20365 (1976):

> . . . It is not expected that Subpart E, which requires nondiscrimination in recruitment, admissions, and provision of courses and noncurricular services, will impose any significant additional costs.

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[4]Exec. Order 11,821, 39 *Fed. Reg.* 41501 (1974).

[5]Dave M. O'Neill, *Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance*, 41 *Fed. Reg.* 20312 (1976); updated but not published May 1977 (available on request from HEW).

> Paragraph [(d)] of section 84.44 provides that a recipient must ensure that no qualified handicapped student with impaired communicative skills be denied effective participation in its program because of lack of necessary auxiliary educational aids. (Individually prescribed or general purpose aids such as eyeglasses or wheel chairs are not, of course, included). In many cases, this provision will not impose any additional financial burden because the aids are provided by vocational rehabilitation agencies. 41 *Fed. Reg.* at 20360-61.

Despite these assumptions a bureaucratic conflict within the Department of Health, Education and Welfare—a conflict within the Secretary's power to resolve—has resulted in many state rehabilitation agencies refusing to provide the expected rehabilitation services and auxiliary aids. Last year a task force that included representatives of higher education and handicapped individuals described the frustrating situation that currently confronts colleges and universities and their handicapped students as follows:

* * *

> The secretary [of HEW] evidently promulgated the auxiliary aid requirement based on an assumption that resources from his own department [specifically from state rehabilitation agencies funded by HEW's Rehabilitation Services Administration] would be available at a certain level. They are not, and HEW's failure to rectify this situation leaves students, higher education administrators, and rehabilitation personnel alike unsure of the department's com-

mitments to higher education for handicapped persons.

Federally financed rehabilitation programs are a major source of financial support for handicapped persons. Availability of such services can be determinative in successfully financing higher education for individual students; . . .state rehabilitation agencies often can provide auxiliary aids more economically, and from a basis of wider knowledge and expertise, than can thousands of individual educational institutions. Yet there now exists a situation wherein [the Office for Civil Rights of the Rehabilitation Services Administration of HEW,] and state rehabilitation agencies acquiesce in or actively promote the following barriers to service for handicapped students in higher education:

- Application of the "similar benefits" provision of section 101(a)(8) of the Rehabilitation Act [of 1973], to relieve rehabilitation agencies of all responsibility for students in higher education, on the grounds that section 504 makes institutions of higher education responsible for the "first dollar" of resources for them—despite the fact that section 101(a)(8) was enacted many years before section 504 and for purposes unrelatd to it, [and despite the fact that Title V of the Act did not authorize services as did Titles I-III (see discussion pp. 17-18, *infra.*)] . . . .

- [Discretionary] application of "needs" tests in [state] rehabilitation programs that are not coordinated with student financial aid needs test administered by institutions. . . .

• Application of discretionary authority in the Rehabilitation Act to disfavor students in higher education as a class of rehabilitation services beneficiaries.

• Application of discretionary authority in the Rehabilitation Act to disfavor graduate and post-baccalaureate professional students as a class of rehabilitation services beneficiaries, with particular adverse impact upon students who do not continue their post-baccalaureate education directly from undergraduate study.

• A wide variety of differences in rules and levels of benefits among state rehabilitation agencies, particularly as to "portability" of rehabilitation benefits for study outside the provider state.

• Application by some state rehabilitation agencies of low funding maximums which strongly favor the lower tuition costs of state colleges (for obvious state interests) to the degree that students are being discouraged financially from considering the alternative of independent education.

* * *

National Association of College and University Business Officers (NACUBO) Task Force on Secton 504, *Issues and Answers,* July 1979 NACUBO BUSINESS OFFICER 12, 20-21.

The fact that contrary to HEW's stated assumptions, auxiliary aids are not being provided by state vocational rehabilitation agencies does not justify the Fifth Circuit's finding that Section 84.44(d) of the HEW Regulation

obligates all colleges and universities that receive federal aid to bear the total costs of such services. Such a finding would, at a minimum, require a complete reassessment of the inflationary impact of Subpart E of the 504 Regulation[6] In addition, it would raise a serious question of the validity of the regulation under the standards set forth in the Supreme Court's decision in *Southeastern Community College v. Davis,* 442 U.S. 397 (1979).

B.

Any administrative regulation that would under the facts of this case, require The University of Texas to provide free interpreter services would constitute an "unauthorized extension of the obligations imposed by the statute."

"It is elementary that [t]he starting point in every case involving the construction of a statute is the language itself [citation omitted]." 442 U.S. at 405. The language of Section 504 provides no assistance in determining whether, under *Davis,* the HEW has exceeded its authority in publishing §84.44(d) of the §504 Regulation if that provision is interpreted to impose an obligation on colleges and universities to provide free interpreter services. Section 504 of the Rehabilitation Act of 1973 provides in full:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 29 U.S.C. §794 (1976).

[6]Executive Order 11,821, 39 *Fed. Reg.* 41501 (1974).

It is arguable this language is so vague as to vest "virtually unfettered" discretion in the Executive Branch thereby warranting a finding that the Act represents an "unconstitutional delegation of legislative power." *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935).[7] At a minimum, it is stating the obvious to say one

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[7]The view that the statute is a prime example of "delegation running riot", 295 U.S. at 553 (concurring opinion of Cardozo, J.), is reinforced by the following excerpts from the Notice of Intent to Issue Proposed Rules published by the Department of Health, Education and Welfare on May 17, 1976:

> Because the concepts underlying Section 504 were new and complex and few judicial precedents existed in the area, the very general language of the statute creates serious problems of interpretation. There is almost no substantive legislative history surrounding the development and enactment of Section 504. There were, for example, no public hearings accompaying the original bills, and there was almost no substantive floor debate. Only in December 1974, during passage of the Rehabilitation Act Amendments, did Congress attempt to clarify its intent in enacting Section 504 and to articulate this intent in a manner which could be used by the Department as guidance in its efforts to administer the Act.
>
> • • •
>
> There is no legislatively directed scheme of enforcement such as those provided in Sections 602 of Title VI of the Civil Rights Act of 1964 and 902 of Title IX of the Educational Amendments of 1972. To fill the legislative void, Executive Order 11914 was issued which, among other things, supplies the directive for specific enforcement procedures and sanctions for noncompliance, all of which are based on precedents from these other statutes. In addition, it provides for a general enforcement scheme under which the Secretary of Health, Education, and Welfare is assigned responsibility to coordinate the Federal government's implementation of Section 504. In the absence of legislative mandate as to the form of administration of Section 504 and prior to the issuance of E.O. 11914, it fell to this Department, as a granting agency, to develop a

must look beyond the words of the law to determine whether Congress intended Section 504 to be read as imposing an auxiliary aids requirement on all universities that receive federal aid.

In *Southeastern Community College v. Davis, supra,* the Supreme Court examined the language and structure of the Rehabilitation Act of 1973 and concluded

> . . .neither the language, purpose nor history of §504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. 442 U.S. at 411.

Just as it was helpful in *Davis* to look at the other provisions of the 1973 Rehabilitation Act in reaching the conclusion Section 504 does not require affirmative action, it is useful in determining the intended scope of the nondiscrimination requirement to review these provisions as well as other Congressional actions regarding the accommodation of handicapped students in education programs.

The Rehabilitation Act of 1973, 29 U.S.C. Section 701 *et seq.,* as amended by the Rehabilitation Act Amendments of 1974, contains five subchapters: Subchapter I (29 U.S.C. Sections 720-750) provides for federally financed vocational rehabilitation services; Subchapter II (29 U.S.C. Sections 760-764) provides for federally financed

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means of assuring compliance with the prohibitions of the provision.

The most important problem which has hindered the development of the regulation is the constant need to weigh competing equities while resolving complex issues. Thus, while we recognize that the statute creates individual rights, the statute is ambiguous as to the specific scope of these rights.

* * *

41 *Fed. Reg.* 20296 (1976).

research and training to aid the handicapped; Subchapter III (29 U.S.C. Sections 770-776) provides for federally financed special services and facilities for the handicapped; Subchapter IV (29 U.S.C. Sections 780-787) provides for administration and evaluation of the various programs established in Subchapters I through III; Subchapter V (29 U.S.C. Sections 790-794) is entitled "Miscellaneous Provisions" and includes Section 503, dealing with affirmative action in employment under federal contracts and Section 504 dealing with nondiscrimination under federal grants.

Section 504 makes no mention that recipients of federal financial assistance are to provide special services for the handicapped, nor does it authorize federal money to finance any such special services. Indeed, there is no mention of such services or federal services anywhere in Subchapter V. On the other hand, Subchapters I through III are replete with programs providing special services to the handicapped and financing, with federal funds, the provisions of such services. The fact that the provision of services to the handicapped is covered in Subchapters I through III of the Act, and that the provisions of Section V pertaining to nondiscrimination make no mention of provision of services, reasonably only can be construed to mean that Congress did not intend in Section 504 to shift to educational institutions that receive federal aid the financial responsibility for providing special services to the handicapped.

Any other reading of the Section 504 regulations would conflict with the stated purposes of the Rehabilitation Act. The statement of Congressional purpose which prefaces the Rehabilitation Act of 1973 says:

> "The purpose of this chapter is to provide a statutory basis for the Rehabilitation Services Administration, and to *authorize programs* to—

> "(1) develop and implement comprehensive. . . *state plans* for meeting the . . .needs for providing vocational rehabilitation services. . .
>
> * * *
>
> "(6) initiate and expand service to groups of handicapped individuals. . ." 29 U.S.C. Section 701 (emphasis added).

The special services that the Fifth Circuit decision would require colleges to provide the handicapped are not part of an "authorized program" under the Rehabilitation Act. On the other hand, the services that the appellate decision would obligate colleges to pay for *are* included in the authorized programs concerning grants to the states:

> "The purpose of this subchapter [I] is to authorize grants to the States to meet the. . . needs of handicapped individuals, so that such individuals may prepare for an engage in gainful employment."

And, as provided elsewhere in Subchapter I,

"Vocational rehabilitation services provided under this chapter [include]:

> "(6) interpreter services for deaf individuals. . ." 29 U.S.C. Section 723(6).

Thus, Congress demonstrated it knew how to require state rehabilitation agencies receiving direct federal aid to provide interpreters to the deaf. Had it intended Section 504 to be read to obligate all recipients of federal assistance to provide such services (even where the assistance is unrelated to the provision of such services), it would have indicated clearly that was the case. According-

ly, the HEW regulations requiring general federal aid recipients to be the providers of special services to the handicapped are beyond any authority delegated to HEW to interpret and enforce the section.

Subsequent legislation passed by Congress only confirms the validity of this argument. In 1975, two years after it passed Section 504, Congress enacted into law the Education of the Handicapped Act, Public Law 94-142.[8] The stated purpose of this act was

> . . .to assure that all handicapped children have available to them, within the time periods specified in Section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.[9]

The time frame specified as a condition of eligibility for assistance under the Act was as follows:

> . . .a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged

[8] 20 *U.S.C.* § 1401, *et seq.* (1976).
[9] 20 *U.S.C.* § 1401(3) (1976).

> eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law practice, or the order of any court, respecting public education within such age groups in the State. . . . 20 U.S.C. §1412(2)(B).

The term "special education" used in the statute was defined to mean

> . . .specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. 20 U.S.C. §1401(16).

When the Department of Health, Education, and Welfare first proposed the §504 nondiscrimination rules now enforced by the Department of Education, it clearly chose to interpret Section 504 as establishing substantive requirements for elementary and secondary school recipients of federal aid that were identical to those set forth in the Education of the Handicapped Act of 1975.[10] Section 84.33(a) of the final rules, 45 C.F.R. Part 84 (1979), stated generally that compliance with Section 504 in elementary and secondary schools meant the provision of a free appropriate education regardless of the nature or severity of a particular individual's handicap. An "appropriate education" was defined to mean.

> . . .the provision of regular or special education and related aids and services that (i) are designed to meet the individual needs of handicapped persons as adequately as the needs of

[10] 42 *Fed. Reg.* 22676, 22682 (1977).

> handicapped persons are met. . . . 45 C.F.R. §84.33(b)(1)(i) (1979).

It is clear from the chronology of the enactment of the two legislative rules Congress could not have intended such an identity of requirements.

The general rules of statutory interpretation require the assumption Congress is aware of its prior legislative action when it passes a new law[11] If Congress intended Section 504 to be read as the Education Department suggests, one would have to assume Congress knowingly passed redundant legislation two years later. The flexible time frame allowed for compliance with the more recently passed Education of the Handicapped Act cited above reduces such a suggestion to an absurdity.

Section 504 of the Rehabilitation Act did not include any language that suggested a delay in its effectuation would be necessary or appropriate. The final rules issued by HEW were effective a month from the date they were published in 1977. With the exception of a transition period for making buildings accessible,[12] the Department's final rule countenanced no delay in compliance. There is no suggestion in the Education of the Handicapped Act of 1975 of a conflict with the requirements of Section 504. Yet, if the HEW's regulatory interpretation of Section 504 is accepted, a federal recipient which met the time frames of the 1975 statute would be out of compliance with Section 504 and subject to having terminated under §504 any grants it received under the Education of the Handicapped Act of 1975.

Obviously, Congress could not have intended such a result. Therefore, in passing the Education of the Handicapped Act of 1975, Congress must have believed it was imposing new obligations not mandated by the non-

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[11] *Cannon v. University of Chicago*, 441 U.S. 677, 697 (1979).

[12] 45 *C.F.R.* § 84.22 (d) (1979).

discrimination requirement of Section 504. These new obligations included the requirement that elementary and secondary schools provide to their handicapped students special services unique to their needs including "corrective and other supporting services" that would include the provision of sign language interpreters. 20 U.S. C. §1401(17). To the extent Congress in passing Section 504 did not intend to require the provision of special services such as interpreters to handicapped persons in elementary and secondary schools, it seems unlikely Congress intended Section 504's nondiscrimination provision to require colleges and universities routinely to provide such aids at no cost to students.

This view is reinforced by the fact that public elementary and secondary education in this country is both free and compulsory in nearly every circumstance.[13] The same generally cannot be said for higher education. In addition it has been argued that the availability of an free public school education is essential to the meaningful exercise of constitutionally guaranteed rights such as the right to vote.[14] This has never been said of higher education. Therefore, even if Congress did intend through Section 504 to assure a free, appropriate elementary and secondary education to all handicapped persons, it does not necessarily follow that Congress intended Section 504 to require all colleges and universities that are federal aid recipients to absorb any and all additional costs associated with providing educational service to a deaf student.

In the instant case, the record shows that the University of Texas at all times accommodated Respondent Camenisch's handicap by allowing an interpreter in the

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[13]KIRP AND YUDOF, EDUCATIONAL POLICY AND THE LAW 1-10 (1974) ("In all but two states, American children are legally obliged to attend school,")

[14]*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35-36 (1973).

classroom (R., Vol. II, p. 12) and by adding to the standard student budget used in calculating a student's financial need the extra expenses incurred by Mr. Camenisch by reason of his hearing impairment. (R., Vol. II, p. 5). Such actions assured that Mr. Camenisch was not arbitrarily excluded by the University from participating in the degree program of his choice. The nondiscrimnation requirement of Section 504 requires nothing more.

II.

THE NONDISCRIMINATION REQUIREMENT OF SECTION 504 DOES NOT IMPOSE ON THE UNIVERSITY OF TEXAS AN OBLIGATION TO DO MORE THAN MAKE REASONABLE ACCOMMODATION TO THE KNOWN HANDICAPS OF ITS STUDENTS.

In this case, the Court of Appeals held that The University of Texas could be excused from providing respondent Camenisch with sign language interpreters only if it could show Mr. Camenisch could not successfully perform in his chosen profession. 616 F.2d at 133. This is an unnecessarily overboard reading of the statute and regulations that imposes on colleges and universities strict liability for meeting all the potential educational needs of their handicapped students without regard to the reasonableness of the accommodations needed or their costs. That the statute does not require this result is amply demonstrated by the Department's own regulations and by the Supreme Court's decision in *Davis*.

Without any additional guidance than is provided on the face of the 504 statute, the Department of Health, Education and Welfare concluded with respect to employees that the reasonableness of a necessary accommodation could be taken into account in deciding whether

a particular handicapped individual is "qualified" for a job. 45 C.F.R. §84.3(k)(1) (1979). At the same time, HEW defined a "qualified handicapped person" with respect to postsecondary education services as an individual who "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." 45 C.F.R. §84.3(k)(3)(1979).

Although, HEW's failure to include in the postsecondary education provision quoted above any reference to accommodation could be said to support an argument no accommodation need be made,[15] to date it has been interpreted by the Department and, apparently, the Fifth Circuit to mean handicapped students must be accommodated without regard to reason or cost. The Supreme Court's decision in *Davis* suggests that such a "strict liability" requirement is not supported by the language or the spirit of the statute, and is an example of an unauthorized extension of the requirements of the Rehabilitation Act.

As the Supreme Court recognized in *Davis*, there are circumstances in which some action beyond mere neutrality may be required of federal recipients under the nondiscrimination requirements of Section 504:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. . . . [S]ituations may arise when a refusal to modify an existing program might become unreasonable and discriminatory. 442 U.S. at 412.

[15]In fact, Congress' failure to include language in the statute requiring accommodation has been used to support an argument that Section 504 does not require federal recipients to make any accommodation to individual handicaps. *See*, Brief for Equal Employment Advisory Committee as *Amicus Curiae* at 22-27, *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

Although the Court said it is the responsibility of the Department of Health, Education and Welfare, and consequently its successor enforcement agency the Department of Education, to identify those situations in which a refusal to accommodate would constitute discrimination, 442 U.S. at 413, it gave some guidance regarding the factors it would consider in drawing the line between nondiscrimination under §504 and affirmative action. In addition, the Court indicated there are substantial reasons why the Department's interpretations of Section 504 are entitled to less deference than is normally accorded agency interpretations of federal statutes, 442 U.S. at 411 n. 11, which reasons support rejection of the unlimited accommodation requirement imposed by the Fifth Circuit in this case.

Language in the Court's opinion in *Davis* shows the Court recognized compliance with Section 504 might involve "some costs". 442 U.S. at 412. At the same time, the Court quite clearly indicated there is a limit on the expense that must be incurred in the name of nondiscrimination. The opinion of the Court speaks of future events that might someday allow accommodation of handicaps "without imposing undue financial and administrative burdens on a State." 442 U.S. at 412. The opinion goes on to state that should those events take place there *might* arise situations "where a refusal to modify an existing program *might* become unreasonable and discriminatory." 442 U.S. at 412.

In light of these statements that obviously assume some balancing of costs and benefits is appropriate under Section 504, it is clear Subpart E of the §504 Regulation, 45 C.F.R. §§84.41-84.50 (1979), which governs postsecondary education programs must at a minimum be read to incorporate the reasonable accommodation/undue hard-

ship provisions included in Subpart B, 45 C.F.R. §§84.11-84.20 (1979), governing employment practices.

This means that in the instant case the first question that should be asked in addressing the merits of Walter Camenisch's claim to interpreter services is whether provision of such services would constitute a reasonable accommodation. One test of whether provision of such services would be reasonable is whether there are other less burdensome alternatives that would enable Mr. Camenisch to obtain equally effective benefits from the educational "services" provided by The University.[16] A careful and particularized analysis of the nature of Mr. Camenisch's handicap and the courses in which he desired to enroll would be necessary to make this determination.[17] Examples of alternative accommodations that might be deemed "reasonable" include provision of notetakers, access to the instructor's lecture notes, and/or special tutoring.

Even if The University and Mr. Camenisch agreed that provision of interpreters would constitute a reasonable accommodation, the Subpart B employment analysis permits an additional assessment of the hardship that might be imposed on the operation of the recipient's program by providing such an accommodation. Section 84.12(c) of the §504 Regulation sets forth the criteria to be considered in determining whether, in the employment context, a particular accommodation might impose an undue hardship:

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[16]A service or aid must be "equally effective" for the program to be nondiscriminatory under the Regulation, 45 *C.F.R.* § 84.4(b) (2) (1979).

[17]To be "equally effective" an aid need not produce an identical result but must only afford the handicapped person an equal opportunity to obtain in the most integrated setting appropriate to his needs the same benefit offered a nonhandicapped person. 45 *C.F.R.* § 84.4 (b) (2) (1979).

> 1) The overall size of the recipients program with respect to the number of employees, number and type of facilities and size of budget;
>
> 2) The type of the recipient's operation, including the composition of the recipient's workforce and
>
> 3) The nature and cost of the accommodation required. 45 C.F.R. §84.12(c) (1979).

Although some modification of these criteria would be appropriate before using them to assess undue hardship in the context of the provision of educational services, they do provide some guidance regarding the proper application of the concept.

The cost of providing interpreter services to a deaf person enrolled as a full-time student has been estimated to be about $4,000 a year.[18] Whether such an expense would impose an undue hardship on The University of Texas depends either on facts regarding The University's size, facilities and resources that are not on the record or on a legal judgment that $4,000 would, as a matter of law, be "undue."

In *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), the Court said, for purposes of the analogous reasonable accommodation requirement added in 1972 to the religious discrimination prohibition of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(j), that anything more than a *de minimis* expenditure would constitute an undue hardship. Even though the *Hardison* case

[18] *See, e.g., California State University Policy for Providing Services to Students with Disabilities,* SA 80-17 and BA 80-14 (yearly allocations to each state college include $4,000 for each hearing impaired student).

required delicate balancing of the free exercise and establishment clauses of the first amendment, it is important to note that, even in the face of clear and express Congressional intent to impose an accommodation requirement, the scope of that requirement was very narrowly defined by the Supreme Court. Any accommodation requirement imposed by Section 504, which on its face only requires nondiscrimination – not affirmative action, accommodation or preferential treatment – should be similarly limited.

CONCLUSION

This Court should affirm its decision in *Southeastern Community College v. Davis* and hold that the nondiscrimination requirement of Section 504 does not obligate a covered university to procure and compensate a sign language interpreter for a deaf graduate student where that student is able to pay the costs. Alternatively, this court should instruct the Fifth Circuit that the reasonableness of an accommodation and any hardships it imposes must be considered in determining whether the nondiscrimination provision has been violated.

Respectfully submitted,

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